SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

J. S. WOODS,

Petitioner,

v.

INTERSTATE REALTY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI WITH BRIEF THEREUPON TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

J. S. WOODS,

Petitioner,

vs.

INTERSTATE REALTY COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jurisdictional Statement

The jurisdiction of this Honorable Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Sections 1254, 1331, 1332 and 2101, together with Rule 38, 5(b) of this Court.

Time for applying for certiorari to Supreme Court of the United States begins from the date of the overruling of motion for rehearing. *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, 72 L. Ed. 393; *U. S.* v. *Seminole Nation*, 299 U. S. 417, 81 L. Ed. 316; *Department of Banking, State of Nebraska* v. *Pink*, 317 U. S. 264, 87 L. Ed. 254, rehearing denied, 318

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Summary Statement of Matters Involved

Petitioner, J. S. Woods, by his counsel, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals, Fifth Circuit, rendered November 28, 1948, in an action entitled "Interstate Realty Company, Appellant, *v.* J. S. Woods, Appellee," No. 12,259, reversing an order (Tr. 72) [1] of the District Court of the United States for the Northern District of Mississippi in favor of petitioner.

The respondent, a Tennessee corporation, exhibited its complaint in the United States District Court for the Northern District of Mississippi, against the petitioner, an adult resident of such district where the suit was filed (Tr. 1). The suit was brought to recover from the petitioner alleged commissions for the sale of real estate; the amount involved, exclusive of interest and costs, exceeded $3,000.00. The petitioner, in answer to the complaint, alleged that the respondent, a foreign corporation, without becoming domesticated and without qualifying to do business in the State of Mississippi, transacted business in the state, out of which transactions the suit was brought, and that, therefore, the respondent could not enter into an enforceable contract in the State of Mississippi, and was not entitled to maintain any suit in any court therein (Tr. 56). The relevant Mississippi statutes regulating the right of a foreign corporation to transact business in the state, and the re-

[1] References are to Transcript of Record, United States Court of Appeals.

quirement that it procure a license, with penalty for failure so to do, will be found, Section 5319, Mississippi 1942 Code, *Appendix "A"* hereto; Section 5339, Mississippi 1942 Code, *Appendix "B"* hereto; Section 5343, Mississippi 1942 Code, *Appendix "C"* hereto; Section 5344, Mississippi 1942 Code, *Appendix "D"* hereto; Section 155, Chapter 137, Mississippi Laws of 1944, *Appendix "E"* hereto; Section 224, Chapter 137, Mississippi Laws of 1944, *Appendix "F"* hereto.

The petitioner requested of the respondent admission of certain facts (Tr. 61-63) based upon statements contained in the pleadings and admissions of record. Petitioner moved for a summary judgment (Tr. 67). The District Judge held that the respondent was engaged in business in the State of Mississippi and that, therefore, the contracts sued upon were utterly void; that no suit could be maintained and that the same were not enforceable (Tr. 70-72). Accordingly, a motion for summary judgment on the part of petitioner was granted and judgment entered dismissing the complaint (Tr. 72). An appeal was taken to the United States Court of Appeals, Fifth Circuit, and the case will be found reported "Interstate Realty Co. *v.* Woods", 168 Fed. (2d) 701. That court held that under the laws and statutes of the State of Mississippi the contracts sued upon were not absolutely void but unenforceable in the state court. Accordingly, the court reversed the decision of the District Court and held that suit might be maintained in the United States District Court, using the following language:

> "But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the federal courts. If diversity of citizenship exists, the fact that

a foreign corporation may not sue in the State courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State. See David Lupton's Sons Co. *v.* Automobile Club of America, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; McLean *v.* York Oil Field Supply Co., Inc., 5 Cir., 138 F. 2d 804; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 8 Cir., 156 F. 1; Groton Bridge & Mfg. Co. *v.* Amer. Bridge Co., C. C. N. Y., 151 F. 871, 876, 877.

"We therefore hold that the appellant has the right to sue on its contract in the federal District Court sitting in Mississippi.

"The judgment appealed from is reversed."

A copy of the opinion of the United States Court of Appeals, Fifth Circuit, in the instant case, is made *Appendix "G"* hereto. The petitioner filed a petition for rehearing, which was granted, a copy of which order is attached as *Appendix "H"* hereto (Tr. —), and upon reconsideration of the case, the court adhered to its former opinion, copy of which opinion is made *Appendix "I"* hereto (Tr. —). The judgment of the United States Court of Appeals, Fifth Circuit, reversing the judgment of the District Court of the United States for the Northern District of Mississippi, will be found (Tr. —).

Questions Presented

The questions presented are as follows:

1. As to whether or not the respondent, a foreign corporation, might recover in the United States District Court for the Northern District of Mississippi, against petitioner on contracts entered into in the State of Mississippi by transacting business therein without complying with the statutes of the State of Mississippi made a condition precedent to the transaction of business in the state by a foreign corporation,

and upon failure to obtain the privilege license required by law before transacting such business, whether the violation of such statutes rendered the contracts totally void or merely unenforceable in the state court.

2. As to whether or not the United States Court of Appeals for the Fifth Circuit committed error in holding that since the contracts involved were merely unenforceable in the state court that suit might be maintained in the District Court of the United States.

3. As to whether or not recovery may be had in the Federal Court upon a cause of action created in the State of Mississippi in violation of the statutes and public policy of the state which contracts are unenforceable in the state courts.

Reasons Relied On for Allowance of the Writ

Reason I: The United States Court of Appeals has decided a federal question in conflict with applicable decisions of this court. A suit may not be maintained in the Federal Court upon a cause of action which is not enforceable in the State Court because it is in violation of the statutes and public policy of the state. *Dr. Furman Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832; *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487; *John G. Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 82 L. Ed. 1290; *Guaranty Trust Company* v. *York*, 326 U. S. 99, 89 L. Ed. 2079, 160 A. L. R. 1231; *Cities Service Oil Company* v. *Dunlap*, 308 U. S. 208, 84 L. Ed. 196; *Palmer* v. *Hoffman*, 318 U. S. 109, 87 L. Ed. 645, 144 A. L. R. 719; *Griffin* v. *McCoach*, 313 U. S. 498, 85 L. Ed. 1481, 134 A. L. R. 1462; *Klaxton Company* v. *Stentor Electric Manufacturing Company, Inc.*, 313 U. S. 487, 85 L. Ed. 1488, 160.

Reason II: The United States Court of Appeals has decided an important question of a local nature in a way which is in conflict with applicable local decisions, in that it has decided that the contract of a foreign corporation made in the state without qualifying under the laws thereof was merely unenforceable and that suit might be maintained thereon in the Federal Court. *Newell Contracting Co.* v. *State Highway Commission*, 195 Miss. 395, 15 So. (2d) 700; *Quartette Music Co.* v. *Haygood*, 108 Miss. 755, 67 So. 211; *Bohn* v. *Lowry*, 77 Miss. 424, 27 So. 604; *Stamps* v. *Frost*, 174 Miss. 325, 164 So. 584; *Grapico Bottling Co.* v. *Ennis*, 140 Miss. 502, 106 So. 97; *Marx & Bensdorf* v. *First Joint Stock Land Bank of New Orleans*, 178 Miss. 345, 173 So. 297; *Case* v. *Mills Novelty Co.*, 187 Miss. 673, 193 So. 625, wherein it is held by the Supreme Court of Mississippi that contracts entered into are void and unenforceable.

Reason III: And for other reasons appearing to be assigned at the hearing.

Petitioner attaches to this petition a certified copy of the transcript of the record of the United States Court of Appeals and upon a presentation of the petition will furnish ten copies of the record as printed in the United States Court of Appeals, Fifth Circuit, with proceedings and opinions in that court.

Wherefore, petitioner prays for a writ of certiorari from this Honorable Court directed to the United States Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this court for its review and determination, on a day named therein, a full and complete transcript of the record and all of the proceedings in the case of *Interstate Realty Company* v. *J. S. Woods*, No. 12,259, on the docket of the court, and that the judgment of said

court may be reversed, the judgment of the United States District Court affirmed, and petitioner afforded appropriate relief.

WILLIAM H. WATKINS,
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Sardis, Mississippi;
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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Respondent

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Judge is not officially reported but is printed tr. 70. The opinion of the Court of Appeals filed June 18, 1948 is reported *Interstate Realty Company* v. *Woods*, 168 Fed. 2d 701, is in the record at page — and is made Appendix 8 to this brief. The opinion of the Court of Appeals filed November 26, 1948 is in the record at page — and is made Appendix — to this brief.

Basis for Jurisdiction

The statement showing the grounds upon which jurisdiction of this court is invoked is set forth at page 1 of

the foregoing petition and is by reference adopted as a part of this brief.

Statutes Involved

(A) This case involves a construction of Section 725, Title 28, U. S. C. A., containing the following language:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

(B) Section 5319, Mississippi 1942 Code, made Appendix 1 to this brief.

(C) Section 5339, Mississippi Code of 1942, made Appendix 2 to this brief.

(D) Section 5343, Mississippi Code of 1942, made Appendix 3 to this brief.

(E) Section 5344, Mississippi Code of 1942, made Appendix 4 to this brief.

(F) Section 155, Chapter 137, Mississippi Laws of 1944 made Appendix 5 to this brief.

(G) Section 224, Chapter 137, Mississippi Laws of 1944 made Appendix 6 to this brief.

Statement

The material facts have been set forth in the summary statement at pages 1, et seq. of the preceding petition and such statement is by reference adopted as part of this brief.

ARGUMENT

Point I

The United States Court of Appeals has decided an important question of Federal law contrary to applicable decisions of this Court.

The United States Court of Appeals in this case has decided that a foreign corporation transacting business in the State of Mississippi without qualifying as provided by law may maintain suit in the Federal Court upon a cause of action arising out of such business although under the laws of the State of Mississippi such contracts are void and unenforceable and suit may not be prosecuted thereupon. There is some confusion in the decisions of the Supreme Court of Mississippi as to whether such a contract is absolutely null and void or merely unenforceable. In the instant case, 168 Fed. (2d) 701, at Page 703, the Court of Appeals used the following language:

> "Whether the court in using the word 'void' meant absolutely null, or void in the sense of unenforceable, the opinion does not make clear. Citation of the Haygood case would indicate that the court was of the opinion that the contract was absolutely null; but citation of the other cases, all of them opinions by the Supreme Court of Mississippi later in date than the Haygood case, would indicate that the court meant that the contract was 'void' only in the sense that it was unenforceable in the Mississippi courts."

Section 5319, Mississippi 1942 Code, Appendix "A" hereto, provides that every foreign corporation before doing business in the state shall appoint an agent upon whom service of process may be had, and that any foreign corporation failing to comply with this provision shall not

be permitted to bring or maintain any action or suit in any of the courts of the state.

Section 5339, Mississippi 1942 Code, Appendix "B" hereto, provides how a foreign corporation may become domesticated.

Section 5343, Mississippi 1942 Code, Appendix "C" hereto, prohibits any corporation from transacting business in the state without compliance with the statute by filing a duly certified copy of its articles of incorporation, etc., and the act provides for a fine of $100.00 for violation of the act.

Section 5344, Mississippi 1942 Code, Appendix "D" hereto, contains the following language:

> "And the acts of the agents of any such foreign corporation shall have the same force and validity as the acts of agents of private persons; but such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy."

Section 155, Chapter 137, Mississippi Laws of 1944, Appendix "E" hereto, requires any person or corporation negotiating sales of real estate in Mississippi, as a condition precedent thereto, to acquire a privilege license by the payment of a tax under the act.

Section 224, Chapter 137, Mississippi Laws of 1944, being Appendix "F" hereto, provides that any person, firm or corporation, violating the act will be guilty of a misdemeanor and shall be imprisoned in the county jail, not exceeding six months or fined not more than $500.00.

In the case of *Quartette Music Co.* v. *Haygood*, 108 Miss. 755, 67 So. 211, in determining the question involved here, the court used the following language:

> "A long line of decisions of this court support the judgment of the learned trial judge.

"Section 935, Code of 1906, provides that:

"'Every . . . corporation for profit incorporated under or by virtue of the laws of . . . any other state . . . . shall file in the office of the secretary of state a copy of its charter of incorporation.'

"The statute further provides that:

"Any 'foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation . . . shall be liable to a fine of not less than one hundred dollars.'

"In Bohn *v.* Lowery, 77 Miss. 427, 27 So. 605, this rule is approved:

"'Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract though the statute itself does not mention that it shall be so, but only inflicts a prohibition, though there are no prohibitory words in the statute.'

"There are some decisions in our books which apparently conflict with this rule, but they were all overruled by Woodson *v.* Hopkins, 85 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275."

The court expressly approved the case of *Bohn* v. *Lowery*, 77 Miss. 427, 27 So. 605, in which case a physician practiced medicine in the state without procuring a license which failure was punishable as a misdemeanor.

The latest case in the Supreme Court of Mississippi dealing with the subject matter is *Newell Contracting Co.* v. *State Highway Commission*, 195 Miss. 395, 15 So. (2d) 700, where the court said:

"We are of the opinion that the court below was correct in holding that the appellant was doing business in this state and that there had been no substantial compliance with the statutes here involved until Sep-

tember 16, 1933, and that hence the contract sued on is void and unenforcible. Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211; Peterman Construction & Supply Co. *v.* Blumenfeld, 156 Miss. 55, 125 So. 548; Wiley Electric Co. *v.* Electric Storage Battery Co., 167 Miss. 842, 147 So. 773; Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Case *v.* Mills Novelty Co., 187 Miss. 673, 193 So. 625, 126 A. L. R. 1102."

In the case of *David Lupton's Sons Co.* v. *Automobile Club of America*, 225 U. S. 489, 56 L. Ed. 1177, Ann. Cas. 1914A, this Court held that a similar prohibition appearing in a New York statute extended no further than the state court, and that such foreign corporation, though it had not complied with the conditions of doing business, might sue in the Federal Court sitting in the state. This case was followed in the cases of *Industrial Finance Corporation* v. *Community Finance Co.* (5th Cir.), 294 Fed. 870, and *Brace* v. *Gauger-Korsmo Const. Co. et al.* (8th Cir.), 36 Fed (2d) 661. The court in the instant case held that the contracts made by the respondent were not absolutely void but merely unenforceable in the state court but that respondent had access to the Federal Court sitting in the state, citing what is known as the *Lupton* case. The court used the following language:

"But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in the State courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State. See David Lupton's Sons Co. *v.* Automobile Club of America, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177,

Ann. Cas. 1914A 699; McLean *v.* York Oil Field Supply Co., Inc., 5 Cir., 138 F. 2d 804; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 8 Cir., 156 F. 1; Groton Bridge & Mfg. Co. *v.* Amer. Bridge Co., C. C. N. Y., 151 F. 871, 876, 877.

"We therefore hold that the appellant has the right to sue on its contract in the federal District Court sitting in Mississippi.

"The judgment appealed from is reversed."

The question involved, however, requires a statement of the development of the law resulting in the rule announced in the case of *Angel* v. *Bullington*, 330 U. S. 183, 91 L. Ed. 832.

U. S. C. A., Title 28, Section 725, contains the following language:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Beginning with the case of *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865, 871, the court held that the foregoing section applied only to statutes of the state, but that the Federal court sitting in a state was at liberty to investigate and determine the common law for itself. This rule prevailed for many years, and until the decision of the court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487. There, a cause of action in tort which arose in the State of Pennsylvania was the subject of suit in the State of New York, and following the case of *Swift* v. *Tyson*, the District Court of New York held that the common law of the forum would control. This Court reversed the decision of the Second Circuit, and in so doing held that there was no general common law of the Federal

courts, but that the common law of the state should be applied. The court used the following language:

> "Experience in applying the doctrine of Swift *v.* Tyson, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.
>
> "On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. Swift *v.* Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State. * * *"

See also *John G. Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290.

The question was again reviewed in the case of *Guaranty Trust Company* v. *York,* 326 U. S. 99, 89 L. Ed. 2079, 160 A. L. R. 1231. In that case, a suit in equity was filed in the United States District Court for the State of New York by the respondent, York. The position taken in the suit was that, since the cause of action was one in equity, the six-year statute of limitations pled by the petitioner in bar of the action was not applicable; that, upon the other hand, the

question of the statute of limitations was a remedial matter of procedure, and that since the respondent had no adequate remedy at law, but had the right to go into a court of equity, it was asserted that the New York statute of limitations would not be applicable. The Supreme Court of the United States reversed the decision of the Second Circuit, and used the following language:

> "Matters of 'substance' and matters of 'procedure' are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. See Home Ins. Co. *v.* Dick, 281 U. S. 397, 409, 74 L. Ed. 926, 934, 50 S. Ct. 338, 74 A. L. R. 701. And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to ex post facto legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws. See, e. g., American R. Exp. Co. *v.* Levee, 263 U. S. 19, 21, 68 L. Ed. 140, 143, 44 S. Ct. 11; Davis *v.* Wechsler, 263 U. S. 22, 24, 25, 68 L. Ed. 143, 145, 146, 44 S. Ct. 13; W. B. Worthen Co. *v.* Kavanaugh, 295 U. S. 56, 60, 79 L. Ed. 1298, 1301, 55 S. Ct. 555, 97 A. L. R. 905; Garrett *v.* Moore McCormack Co., 317 U. S. 239, 248, 249, 87 L. Ed. 239, 245, 246, 63 S. Ct. 246; and see Tunks, Categorization and Federalism: 'Substance' and 'Procedure' After Erie Railroad *v.* Tompkins (1939), 34 Ill. L. Rev. 271, 274-276; Cook, Logical and Legal Bases of Conflict of Laws (1942), 163-165.
>
> "Here we are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a nonresi-

dent, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.

"And so, putting to one side abstractions regarding 'substance' and 'procedure', we have held that in diversity cases the federal courts must follow the law of the State as to burden of proof. Cities Serv. Oil Co. *v.* Dunlap, 308 U. S. 208, 84 L. Ed. 196, 60 S. Ct. 201, as to conflict of laws, Klaxon Co. *v.* Stentor Electric Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020, as to contributory negligence, Palmer *v.* Hoffman, 318 U. S. 109, 117, 87 L. Ed. 645, 651, 63 S. Ct. 477, 144 A. L. R. 719. And see Sampson *v.* Channell, 110 F. 2d 754. Erie R. Co. *v.* Tompkins has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the federal courts. A policy so important to our federalism must be kept free from entanglements with analytical or terminological niceties."

The Court also used the following language:

"Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. The Framers of the Constitution, according to Marshall, entertained 'apprehensions' lest distant suitors be subjected to local bias in State courts, or, at least, viewed with 'indulgence the possible fears and apprehensions' of such suitors. Bank of the United States *v.* Deveaux, 5 Cranch (US) 61, 87, 3 L. Ed. 38, 44. And so Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign

> of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a Federal court under diversity jurisdiction, it cannot be said too often, is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be held in equity."

The question was examined and extended by this Court in the case of *Dr. Furman Angel* v. *W. H. Bullington*, 330 U. S. 183, 91 L. Ed. 832. In that case, a North Carolina statute prohibited a suit for recovery of a deficiency on a mortgage indebtedness. Suit was filed by the respondent in the state court and met an adverse judgment, whereupon the respondent plaintiff filed suit in the United States District Court on the theory that the contract was not void but merely unenforceable in a North Carolina court, and since diversity of citizenship existed, relied upon the *Lupton* case, contending that suit might be maintained in the Federal District Court. The Court held, in the first place, that the respondent plaintiff, not having appealed from the judgment rendered in the state court, was bound by the judgment; that the same was *res judicata*. The Court further held, however, that no suit could be maintained in the Federal court based upon diversity of citizenship unless the suit could be maintained in the state court, and in doing so held that the *Lupton* case was obsolete. The Court used the following language:

> "It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina State courts but not the federal

court sitting in North Carolina. In the first place, the North Carolina Supreme Court said no such thing. It construed the statute expressive of State policy and spoke only of the jurisdiction of the State courts because it was concerned only with the State courts. Secondly, it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment, while impliedly authorizing citizens of other States to secure such deficiency judgments against North Carolinians. Thirdly, a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.

"Cases like David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489, 56 L. ed. 1177, 32 S. Ct. 711, Ann. Cas. 1914A 699, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts. Com-

pare Suydam v. Broadnax, 14 Pet. (U.S.) 67, 75, 10 L. ed. 357, 361. Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State. Holmberg v. Armbrecht, 327 U. S. 392, 90 L. ed. 743, 66 S. Ct. 582, 162 A. L. R. 719."

The Court of Appeals committed error in stating that the announcement of this court in the Bullington Case to the effect that the Lupton case and other similar cases were obsolete was merely argumentative. The decision of the court in the Bullington Case was placed upon two grounds, either of which was a sufficient basis for the court's decision. The court held that the judgment in favor of the petitioner in the Bullington case was *res judicata* and that the decision was binding upon the respondent as to all questions actually decided or which might have been included; that since the respondent had not appealed from the decision in the North Carolina State Court the same had become final and the Respondent was barred by the adjudication. However, the court also proceeded to say that, irrespective of that question, since jurisdiction was based upon diversity of citizenship, and the action was one which could not be maintained in the State court, no action could be maintained on the same cause of action in the Federal court. It is very true that the Court might have based its decision entirely upon either ground, but that was a question for it to decide, and having based its decision upon both grounds, either of which would afford a sufficient basis for the Court's decision, neither of the Court's announcements may be disregarded. Under that decision the Lupton case became obsolete and may not be used as authority for the maintenance of the present suit.

In the case of *Bullington* v. *Angel*, D. C., North Carolina,

56 Fed. Supp. 372, where the suit was brought after final disposition in the Supreme Court of North Carolina, 220 N. C. 18, S. E. 2d 411, the only question determined by the District Judge was that the limitation on the jurisdiction of State courts provided in the North Carolina statute did not deprive the Federal court of jurisdiction. The syllabus is in the following language:

> "The North Carolina statute barring the recovery of deficiency judgments, which is construed as a limitation on the jurisdiction of the courts of that state, does not deprive the Federal District Court of jurisdiction of an action brought by a nonresident to recover a deficiency judgment in an amount in excess of $3,000 based on a mortgage executed in Virginia on land located in Virginia. Public Laws N. C. 1933, c. 36; Jud. Code #24 (1) 28 U. S. C. A. #41 (1)."

The Court passed on no certain question.

When we turn to the case of *Angel* v. *Bullington* on appeal to the 4th Cir., 150 Fed. 2d, 679, the court affirmed the judgment of the District Judge and relied upon the *Lupton* case. The case of *Guaranty Trust Company of New York* v. *York* was directed to the attention of the Court in response to which the following language was used by Judge Dobie in affirming the action of the District Judge:

> "The very recent case of Guaranty Trust Co. of New York v. York, 325 U. S. —, 65 S. Ct. 1464, decided by the Supreme Court June 18, 1945, after the argument in the pending case, has come to our attention. It holds specifically that an action which would be barred by a State statute of limitations, of brought in a State court, would also be barred if brought in a Federal court in equity in the same State under the provisions of the Federal statutes relating to diversity of citizenship. The burden of the decision which follows the principle of Erie Ry. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, is that

'since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.' (325 U. S.—, 65 S. Ct. 1469). It will be noticed that the cause of action there under consideration arose under the law of the State in which the action was brought whereas in the pending case the cause of action was based upon a contract executed under the law of another State. We think, moreover, that the decision does not affect the rule that a State statute cannot restrict the jurisdiction of the Federal courts based on diversity of citizenship, and that the decision does not relate to the questions, discussed in the cases last cited, as to how far the public policy of a State may modify its obligations under the full faith and credit clause of the Federal Constitution or the due process clause of the Fourteenth Amendment."

When the case reached this court on Certiorari, petitioner's Counsel expressly presented to the Court the view that if the Respondent could not maintain his suit in the State court the same could not be prosecuted in the Federal court. We take the following language from brief of Counsel for petitioner. 91 L. Ed. 833:

"If the statute was valid for the purposes enacted, it was binding on both the state and Federal courts. Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed 1188, 58 S. Ct. 817, 114 A. L. R. 1487; Guaranty Trust Co. v. York, 326 U. S. 99, 89 L. ed. 2079, 65 S. Ct. 1464, 160 A. L. R. 1231.

"Since it has been judicially determined by a court of competent jurisdiction that the state court does not have jurisdiction to try the causes, the Federal court, under the authority of Erie R. Co. *v.* Tompkins, 304, U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487; Guaranty Trust Co. *v.* York, 326 U. S. 99, 89 L. Ed.

2079, 65 S. Ct. 1464, 160 A. L. R. 1231 is likewise without authority to maintain the action."

The brief of Counsel for petitioner likewise presented the view that the Respondent was barred from recovery by the Judgment of the Supreme Court of North Carolina. When we turn to brief of the Attorneys for the Respondent we find that both questions were presented. The Circuit Court of Appeals therefore committed error in passing on petition for rehearing in holding that this Court did not intend to hold that the *Lupton* case was obsolete and that the language in response thereto was purely argumentative. An analysis of the case with the two preceeding appeals demonstrates that the Court intended as it had the right to do, to decide both questions and the Court statement that the *Lupton* case was obsolete is just as much a part of the Court's opinion as that dealing with the question of *res judicata*.

At the time the statute was passed the rule supported by uniform authority was that the Federal court was a State court in the district in which it sat. The following cases are directly in point: *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 89 L. Ed. —; *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487; *Palmer* v. *Hoffman*, 318 U. S. 100, 87 L. Ed. 645, 145 A. L. R. 710 (burden of proof); *Stone* v. *New York Life Insurance Co.*, 311 U. S. 464, 85 L. Ed. 284 (sufficiency of proof); *Cities Service Oil Co.* v. *Dunlap*, 308 U. S. 208, 84 L. Ed. 196 (as to conflict of laws); *Klaxton Co* v. *Stentor Electric Manufacturing Co.*, 313 U. S. 487, 85 L. Ed. 1477. The rule derived from these cases is that a litigant filing suit in the Federal Court stands in exactly the same position as if the suit had been filed in the State court. Such litigant can derive no advantage in the Federal court over that available to the litigant in the State court insofar as the

applicable law determining the controversy is concerned. The contracts constituting the cause of action of Respondent violated the statutes and public policy of the State of Mississippi which statutes and public policy become embodied in and became part of the laws of the State of Mississippi. A litigant filing suit in the Federal court may escape local prejudice but cannot take refuge therein from the laws, statutes, and public policy of the State.

The right of the Respondent to maintain its suit in the Federal court does not involve a question of jurisdiction. No statute of Mississippi could prevent a Respondent from going into the Federal court to enforce a right or from removing the case from a State Court to the Federal Court. *Barrow* v. *Kane*, 170 U. S. 100; 42 L. Ed. 964; *Tom J. Terral* v. *Burk Construction Co.* 257 U. S. 529, 66 L. Ed. 352, 21 A. L. R. 186; *Southern R. R. Co.* v. *Allison*, 190 U. S., 326. The Mississippi statutes did not prevent the Respondent from filing a suit in the Federal Court. The Respondent availed itself of its constitutional right to do so and was heard however, when it filed its suit in Federal court it was face to face with the State law, the same Juris Prudence prevailed in the Federal court as would have confronted the Respondent in the State court. It could not convert an unenforceable right of action into a valid cause of action by going across the street and filing its suit in the Federal court. There was no cause of lack of jurisdiction but failure to have because of action.

In the case of *Wabash R. Co.* v. *Duncan* (8th Cir.) 170 Fed. (2d) 38, where the following language is used at *Page 41:*

> " 'Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. . . . It may undoubtedly be shown in defense that plaintiff has no right under the allegations of his bill or the

facts of the case to bring suit, but that is no defect of jurisdiction, but of title.' Illinois Central Railroad Co. *v.* Adams, 180 U. S. 28, 34, 21 S. Ct. 251, 253, 45 L. Ed. 410. See also Walling *v.* Miller, 8 Cir., 138 F. 2d 629, 631, and cases cited."

Nor neither may it be said that the Mississippi statute merely precluded action in the State court. It is very true that Section 5319, Mississippi 1942 Code provides that the foreign corporation failing to comply should not be permitted to bring or maintain an action or suit in any of the courts of the State. At the time this statute was passed, and for many years prior thereto, the authorities uniformly held that the Federal court was a State court in the District in which it sat.

Ex Parte Schoenberger, 96 U. S. 369, 24 L. Ed. 853; *Great Southern Life Insurance Co.* v. *Burwell* (5th Cir.) 12 Fed. (2d) 244.

In the case of *Sullivan* v. *Title Guarantee and Trust Company* (2d Cir.) 167 Fed. 2d, 393 the court used the following language:

"As we have been often advised, a federal court, in a diversity suit 'should adjudicate controversies as if it were only another state court.' Vanston Bondholders Protective Committee *v.* Green, 329 U. S. 156, 162, 67 S. Ct. 237; Holmberg *v.* Armbrecht, 327 U. S. 392, 394, 66 S. Ct. 582, 90 L. Ed. 743, 162, A. L. R., 719; Guaranty Trust Co. *vs.* York, 326 U. S. 99, 108, 109, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 A. L. R. 1231."

Section 5344, Mississippi Code of 1942 provides that where a foreign corporation violates the law or public policy of the State that it may not sue in any court. The public policy of the State may be found in its statutes and judicial decisions.

Whelchel v. *Stennett*, 192 Miss. 241, 9 So. (2d) 418;

Green v. *White*, 194 Miss. 145, 11 So. (2d) 816; *State* v. *Hines Lumber Company*, 106 Miss. 780, 64 So. 729.

Neither may it be said that the Mississippi statutes are merely procedural. This cause is foreclosed in the case of *Guaranty Bank & Trust Co.* v. *York*. In Stumberg, Conflict of Laws, 128, the following rule is answered:

> "It may be stated thus: procedural rules are those which concern methods of presenting to a court the operative facts upon which the legal relations depend: substantive rules, those which concern the legal effect of those facts after they have been established."

Procedural involves the methods of continuing litigation and judicial procedures. *Brenizer* v. *Nashville R. R. Co.*, 156 Tenn. 479, 3 S. W. (2d) 1053, 8 S. W. (2d) 1099. Procedural is merely the machinery for carrying on a suit. *Taylor* v. *Reg.* 1 Can 65 Substantial law relates to rights and duties which give rights to a cause of action. Procedural is the machinery for carrying on the suit. *Jones* v. *Erie R. R. Co.*, 106 Ohio State, 408, 140 N. E. 366. In the case of *State* v. *Pavelich Washington*, 279 Pacific, 1102, the destinction is drawn in the following language: 50 Corpus Juris, 426:

> "Although the distinction between procedure and substantive law is not always well understood, and is sometimes vague and indistinct, substantive law is well defined in Mix *v.* Nez Perce County, 18 Ida. 695, 112 P. 215, 32 L. R. A. N. S. 534, as that part of the law which creates, defines and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights, or of obtaining redress for their invasion. It is difficult, therefore, to draw the line in any particular case, beyond which legislative power, over remedy and procedure, cannot pass without touching upon the substantial rights of the parties affected, as it is impossible to fix that boundary by any general condition."

In the case of *Lachman* v. *Penn. Greyhound Lines, Inc.*, (2d Cir.), 160 Fed. (2d) 496, the court said:

> "The line between substance and procedure is not so clearly marked as to be free from doubt in all cases, and the decisions have been influenced by the desire to effectuate the spirit of the doctrine of Erie R. Co. v. Tompkins so as to secure uniformity in the results to be obtained in the state courts and in the Federal courts in diversity cases in each state. This is especially desirable when the remedial law of the state is so closely associated and incorporated with its substantive law as to be necessary in order to maintain and validate the latter. Precourt v. Driscoll, 85 N. H. 280, 157 A. 525, 78 A. L. R. 874."

We respectfully submit that this is an appropriate case for the granting of a Writ of Certiorari. The question involved is one of great public importance. Practically every state in the Union has a statute similar to the Mississippi statute. The conflict between the Court of Appeals in the 5th Circuit and this Court in the *Bullington* case and other cases cited will bring about confusion. We submit that the Writ should be granted as prayed for, that the Judgment of the Court of Appeals of the 5th Circuit be reversed and that of the District Judge be affirmed.

Respectfully submitted,

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APPENDIX "A"

Section 5319, Mississippi Code of 1942

Resident Agent: How Designated.—Every domestic corporation shall maintain an office in the county of its domicile in this state, either in charge of an officer or officers of the corporation, or in charge of some persons or corporation duly designated as resident agent for the service of process by the directors (by whatever name called) of such corporation, a duly certified copy of the resolution designating such resident agent, and the written acceptance of such agency by the agent, to be filed with the secretary of state. In the event of the death, resignation or removal of such resident agent, another shall be substituted within thirty days in the same manner and accompanied by the same fee as in the former appointment; and until such subsfitution, or in event of the failure of a corporation to so designate and qualify a resident agent where one is required by this act; the secretary of state shall be the agent for the service of process upon such corporation without resident agent, until one shall have been designated as herein provided.

Every foreign corporation doing business in the state of Mississippi, whether it has been domesticated or simply authorized to do business within the state of Mississippi shall file a written power of attorney designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation; and any foreign corporation doing business in the state of Mississippi shall file such written power of attorney before it shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is (sic) herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state.

APPENDIX "B"

Section 5339, Mississippi Code of 1942

Foreign Corporations May Be Domesticated.—Every company or corporation incorporated under the laws of any other state, territory or country, now doing business in this state, or hereafter desiring to do business in this state, and desiring to become a domestic corporation in this state, may file with the governor of the state a copy of its charter, or articles of incorporation or association, or in case such company or corporation is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly authenticated and certified under the great seal of the state in which it was incorporated by charter or certificate.

APPENDIX "C"

Section 5343, Mississippi Code of 1942

Charters To Be Filed.—Every company or corporation for profit incorporated under or by virtue of the laws of any government, or of any other state or territory, now or hereafter doing business in this state, shall file in the office of the secretary a copy of its charter or articles of incorporation, or in case such company or corporation is incorporated merely by certificate, then a copy of such certificate duly certified and authenticated. Said charters, articles of incorporation or certificates to be filed shall be duly certified by the president and secretary, or other chief executive of such corporation, and by attaching thereto the corporate seal, and the secretary of state, on the payment of the fees herein provided for shall give certificate that said corporation has filed its charter or articles of incorporation as required by this act, and any foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation, as provided in this act, shall be liable to a fine of not less than $100.00. This section shall not apply to insurance com-

panies, and is not to be taken or construed to change or modify the laws which are directly applicable to the character of corporations.

APPENDIX "D"

Section 5344, Mississippi Code of 1942

Foreign Corporations, Powers.—Corporations which exist by the laws of any other state of the Union, by the acts of Congress, or the laws of any foreign country, may sue in this state by their corporate names, and they shall also be liable to be sued or proceeded against, by attachment or otherwise, as individual non-resident debtors may be sued or proceeded against. And the acts of the agents of any such foreign corporation shall have the same force and validity as the acts of agents of private persons; but such foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy.

APPENDIX "E"

Section 155, Chapter 137, Mississippi Laws of 1944

Real Estate Agents, Rent Collecting Agents, Real Estate Loan Brokers.—Upon each person, whether acting as an individual, as a partnership, or as a member of a partnership, as a corporation, or as an officer or agent of a corporation who is engaged in the business of selling or offering for sale, buying or offering to buy, negotiating the sale or purchase or exchange of real estate; or who is engaged in the business of leasing or offering to lease, renting or offering to rent apartments, or tenant houses, real estate or any interest therein; or who is engaged in the business of collecting any rents as agent for another for compensation; or who is engaged in the business of soliciting or nego-

tiating loans on real estate as agent for another, for a commission, brokerage, or other compensation, as follows:

In municipalities of classes 1 and 2	$20.00
In municipalities of classes 3 and 4	10.00
In municipalities of classes 5, 6, 7 and elsewhere in the county	7.50

Each salesman employed by or working for any licensed real estate agent or agency other than the chief executive officer thereof, shall pay one-half of the said tax.

APPENDIX "F"

Section 224, Chapter 137, Mississippi Laws of 1944

Penalties.—Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor and on conviction thereof shall be fined not more than $500.00 or imprisoned in the county jail not exceeding six months, or by both such fine and imprisonment in the discretion of the court within the limitation aforesaid; and such fine and imprisonment shall be in addition to any other penalty imposed by any particular section of this act. The courts of the county in which the offender resides, or if a company, in which it carries on business, shall have jurisdiction to enforce this section. And persons failing to pay the privilege taxes imposed by this act, and to obtain a license as hereby required, but pursuing the business for which a privilege tax is imposed without procuring such license, may be proceeded against by suit, in addition to being dealt with criminally; and the officer required to collect the tax may seize and sell any property of such person liable for such tax and penalty, in the same manner as he may distrain and sell property of other taxpayers delinquent for the payment of *ad valorem* taxes due on personal property.

APPENDIX "G"

Opinion of the Court

No. 12,259

INTERSTATE REALTY COMPANY

vs.

WOOD

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

LEE, Circuit Judge:

This suit was filed by the appellant, a Tennessee corporation, to recover from appellee, a resident of Mississippi, a broker's commission alleged to be due on the sale of certain of appellee's real estate in the State of Mississippi. Appellee in his answer denied the right of appellant to recover, setting up that appellant was a foreign corporation which, because it had never qualified to do business in the State of Mississippi as provided by Mississippi law, was not entitled to maintain any suit in any court in Mississippi. After filing his answer, the appellee called upon appellant to admit, pursuant to Federal Rules of Civil Procedure, Rule 36, 28 U. S. C. A. following section 723c, that it had not qualified to do business in Mississippi. In response, appellant denied that it was doing business in Mississippi, but admitted a number of transactions in that State over a specified period of years. Upon this admission, the court below, on motion for summary judgment, found that appellant was doing business in Mississippi and held that the contract in question was void. Judgment was thereupon entered dismissing the plaintiff's suit with prejudice. This appeal followed.

The two questions involved are (1) Was appellant doing business in Mississippi within the purview of the statutes? and (2) if so, was the contract with appellee which was

entered into in Mississippi null and void because appellant at that time had not qualified to do business in Mississippi?

(1) The record shows that appellant is a corporation organized under the laws of the State of Tennessee, with its domicile in Memphis, Tenn., and that it had never qualified to do business in Mississippi. Through its agents, however, it had contracted to sell real estate in Mississippi and in connection with sales had sent its agents into Mississippi to meet prospective buyers and to show the properties to be sold. Appellant admitted that in 1942 it earned from 3 sales in Mississippi $2,121.45; in 1943, from 2 sales, $4,064.25; in 1944, from 3 sales $12,000; in 1945, from 14 sales, $14,272.27; and in 1946 from 16 sales, $14,430.75. We think that in view of these admissions the court below was correct in holding that appellant was doing business in Mississippi within the meaning of the Mississippi statutes. Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Wiley Electric Co. *v.* Electric Storage Battery Co., 167 Miss. 842, 147 So. 773.

The question remaining is whether or not appellant's failure to qualify to do business in Mississippi struck with nullity the contract sued upon in this case. The pertinent sections of the Mississippi law are set forth in the margin.

The court below rested its decision upon Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211, 212, and held that under that case the contract here sued upon was null and void because at the time of contracting the appellant had not qualified to do business in the State of Mississippi. In so holding we think the court erred.

In the Haygood case the plaintiff was a Texas corporation and brought suit in the Circuit Court of Lee County, Mississippi, against J. L. Haygood and G. W. Long on a promissory note signed by them in the sum of $225. The defendant moved to dismiss, setting forth that the plaintiff was a foreign corporation and had not qualified to do business in Mississippi and that the note sued upon was the consideration for business done by the corporation in Mississippi. Plaintiff demurred to the plea on the ground that the law referred to was unconstitutional and that the plea did not state sufficient grounds for a dismissal. The trial

court overruled the demurrer and dismissed the plaintiff's suit, and the plaintiff appealed. The Supreme Court affirmed and, citing an earlier Mississippi case said:

"'Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute.'

"There are some decisions in our books which apparently conflict with this rule, but they were all overruled by Woodson *v.* Hopkins, 85 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275."

The latest case called to our attention from the Mississippi Supreme Court on the subject is Newell Contracting Co. *v.* State Highway Commission, 195 Miss. 395, 15 So. 2d 700, 702. There the court said:

"We are of the opinion that the court below was correct in holding that the appellant was doing business in this state and that there had been no substantial compliance with the statutes here involved until September 16, 1933, and that hence the contract sued on is void and unenforcible. Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211; Peterman Construction & Supply Co. *vs.* Blumenfeld, 156 Miss. 55, 125 So. 548; Wiley Electric Co. *v.* Electric Storage Battery Co., 167 Miss. 842, 147 So. 773; Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Case *v.* Mills Novelty Co., 187 Miss. 673, 193 So. 625, 126 A. L. R. 1102" (Emphasis ours.)

Whether the court is using the word "void" meant absolutely null, or void in the sense of unenforceable, the opinion does not make clear. Citation of the Haygood case would indicate that the court was of the opinion that the contract was absolutely null; but citation of the other cases, all of them opinions by the Supreme Court of Mississippi later in date than the Haygood case, would indicate that the court meant that the contract was "void" only in the sense that it was unenforceable in the Mississippi courts.

In Peterman Construction & Supply Co. *v.* Blemenfeld, supra, the Supreme Court of Mississippi said (156 Miss. 55, 125 So. 550):

". . . we think the case is controlled by Quartette Music Co. *v.* Haygood, supra, in which it is said that a contract made without first complying with the provisions of the above quoted statute could not be enforced in the courts of this state.

"That is the policy of this state, and while this case appears to be hard, in that finally the foreign corporation did comply with the law, yet in so far as it affects this contract the compliance cannot be made to relate back to the date of its execution. It was either enforceable on the date of its execution, or unenforceable. Under the statute, as construed by this court, the contract was not enforceable on its execution, and when the one contract was signed it was, in effect, a volume of business already transacted amounting to 200 separate and distinct contracts, in so far as the relation created between the foreign corporation and the several subscribers is concerned. . . ."

In Wiley Electric Co. *v.* Electric Storage Battery Co., supra, the Supreme Court of Mississippi said (167 Miss. 842, 147 So. 777):

". . . This statute closes the doors of the courts of this state to foreign corporations doing business in this state in violation of its provisions, consequently upon the proof in this record we think the suit should have been dismissed."

In Marx & Bensdorf, Inc. *v.* First Joint Stock Land Bank, supra, the Supreme Court of Mississippi in referring to the statute used the following language (178 Miss. 345, 173 So. 298):

". . . It will be noted that the last clause of that paragraph provides that any foreign corporation failing to comply therewith is barred from bringing and maintaining any suit in the courts of this state."

In Case *v.* Mills Novelty Co., supra, the Supreme Court of Mississippi said (187 Miss. 673, 193 So. 626):

"The servicing of this ice cream dispenser was purely a local transaction, not incidental to or necessary for the formation of the sales contract, and was subject wholly to the supervision and control of the state. It necessarily follows therefore that when servicing this ice cream dispenser, which it did through an agent employed for that purpose, the appellee was doing business in this state, and the contract of which this service agreement is a part violated Section 4164, Code of 1930, and is unenforceable."

(2) We think the cases cited in the Newell Contracting Co. case, with the exception of the Haygood case, all indicate that under the Mississippi statutes the prohibition merely closes the door of the State courts to a foreign corporation which has failed to qualify to do business in that State. That this is the true interpretation of the Mississippi law is made clear in Long Beach Canning Co. *v.* Clark, 1926, 141 Miss. 177, 106 So. 646, and Citizens' Bank of Hattiesburg *v.* Grigsby, 1934, 170 Miss. 655, 155 So. 684. In Long Beach Canning Co. *v.* Clark, supra, the Supreme Court of Mississippi said (141 Miss. 177, 106 So. 648):

". . . In Quartette Music Co. *v.* Haygood, 108 Miss. 755, 67 So. 211, it was held that a foreign corporation doing business in this state, which had not filed its charter as required by this section, could not enforce its obligations in the courts of this state.

". . . .

"The statute does not make a forfeiture of property to the state for the failure to record its charter. It simply refuses the aid of its courts to those doing business in violation of the law without recording their charter."

In Citizens' Bank of Hattiesburg *v.* Grigsby, supra, the Mississippi Supreme Court said (170 Miss. 655, 155 So. 685):

"It is next contended that the contract was void, and that no validity can be given to the deed under the foreclosure.

It will be noted, in considering this contention, that the Franklin Bond & Mortgage Company is not a party to the suit, is seeking no relief in court, and has sought none. The statute bearing on the matter denies, to a corporation violating the statute, access to the courts for any relief. We do not think the statute avoids the contract so as to affect third persons, and we are of the opinion that nobody can raise this question but the state of Mississippi, when suit is brought by third persons, or when the litigation is between other persons than the corporation violating the statute and the state of Mississippi. In other words, a sale under a deed of trust in pais passes the title from the trustee to the purchaser. In the original contract between the Franklin Bond & Mortgage Company and Williams, the title passed from Williams to the trustee. The language of the statute does not make the contract entirely void. See Middleton *v.* Georgetown Merchantile Co., 117 Miss. 134, 77 So. 956; Long Beach Cannong Co. *v.* Clark, 141 Miss. 177, 106 So. 646; Nicholson *v.* Myres, 170 Miss. 441, 154 So. 282; Quitman County *v.* Stritze, 70 Miss. 320, 13 So. 36; and the authorities cited under these cases. See also, Springfield Grocery Co. *v.* Devitt, 126 Miss 169, 88 So. 479.

"In our opinion, the case of Long Beach Canning Co. *v.* Clark, supra, is applicable here. In that case it was held, where a foreign corporation did business in this state without filing its charter as required by Section 945, Code 1906 (which is brought forward in the Code of 1930, section 4164), that this did not prevent it from selling property to liquidate its affairs on discontinuing its business, and that the statute prohibiting a foreign corporation from transacting business unless its charter was filed was intended only to deny such foreign corporation access to the courts of the state to enforce rights growing out of business transacted contrary to the statute. It would be too sweeping a decision to hold that the contract was utterly void as to third persons, and it would impose an unreasonable burden on other parties to compel them to see to it that a corporation had complied with the law of the state, when they desired to buy the property of such corporations."

When, therefore, the court in the Newell case used the words "void and unenforcible," we must interpret "void" as meaning that no relief could be granted to a noncomplying foreign corporation in view of the statute. Supposing a Mississippi resident had sued a nonresident corporation in the Mississippi court for breach of contract, the contract having been entered into in Mississippi, would it be contended that the nonresident corporation could set up that since it had not qualified to do business in the State of Mississippi the contract entered into was void? We think not. The Mississippi statutes deny to the noncomplying corporation permission to bring a suit in the State courts; but they do not prevent such a corporation from being sued upon its contracts in the State courts.

(3, 4) But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in the State courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State. See David Lupton's Sons Co. *v.* Automobile Club of America, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; McLean *v.* York Oil Field Supply Co., Inc., 5 Cir., 138 F. 2d 804; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 8 Cir., 156 F. 1; Groton Bridge & Mfg. Co. *v.* Amer. Bridge Co., C.C.N.Y., 151 F. 871, 876, 877

We therefore hold that the appellant has the right to sue on its contract in the federal District Court sitting in Mississippi.

The judgment appealed from is reversed.

APPENDIX "H"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12259

INTERSTATE REALTY COMPANY, *Appellant*,

versus

J. S. WOODS, *Appellee*

Appeal from the District Court of the United States for the Northern District of Mississippi

(October 22, 1948)

On Petition for Rehearing

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

Per CURIAM:

A rehearing is granted restricted to the question whether, in a diversity case, the doors of the federal court sitting in Mississippi are shut to a foreign corporation which may not sue in the state court because it has not complied with the condition for doing business within the state, the rehearing to be submitted upon briefs previously filed and to be filed on or before November 15, 1948.

APPENDIX "I"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12259

INTERSTATE REALTY COMPANY, *Appellant*,

v.

J. S. WOODS, *Appellee*

Appeal from the District Court of the United States for the Northern District of Mississippi

(November 26, 1948)

On Rehearing

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge.

Per CURIAM:

In our original opinion we held that the contract sued upon was not absolutely void but merely unenforceable in the State Court and that by reason of diversity of citizenship the suit may be maintained in the federal court. On application for rehearing, the appellee cited the case of *Angel v. Bullington*, 330 U. S. 183, as overruling the case of *David Lupton's Sons Co. vs. Automobile Club of America*, 225 U. S. 489, 32 Ct. 711, 56 L. Ed. 1177, upon which reliance was placed by us to sustain jurisdiction in the federal court. Accordingly, we granted a rehearing, restricted in its application to the question whether a foreign corporation might sue in the federal court when the doors of the State courts were closed to it because it had not complied with the conditions for doing business within the State.

The Supreme Court in the *Bullington* case was concerned with the application of the doctrine of res adjudicate under a North Carolina Statute prohibiting a suit for recovery on a deficiency judgment. What was said in that case about cases like *David Lupton's Sons Co. v. Automobile Club* was

argumentatory. We do not consider it to have overruled the *David Lupton's Sons Co.* case upon the question with which we are now concerned and with respect to which the *David Lupton's Sons Co.* case expressly dealt.

Entertaining as we do this view, our original opinion and decree reversing the judgment appealed from are reaffirmed in their entirety and made the judgment of the court on rehearing.

A True copy:
Teste:

_____,
Clerk of the United States Court of Appeals for the Fifth Circuit.

(9782)